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In the Supreme Court of the United States

OCTOBER TERM, 1996

INTERCARGO INSURANCE COMPANY FKA INTERNATIONAL CARGO & SURETY CO., ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 19 U.S.C. 1504, the United States Customs Service is required to complete its final computation of duties on imported goods within one year, unless it extends that period as provided in 19 U.S.C. 1504(b), including notice to the importer. The question presented in this case is whether the Customs Service was barred from extending the one-year period because the notice it provided to the importer did not recite one of the statutory reasons for the extension set forth in Section 1504(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 83 F.3d 391. The opinion of the Court of International Trade (Pet. App. A20-A26) is reported at 879 F. Supp. 1338.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1996. A petition for rehearing was denied on July 25, 1996. Pet. App. A17-A18. The petition for a writ of certiorari was filed on October 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 19 U.S.C. 1504(a)(1), the United States Customs Service is required to complete its assessment of import duties on imported goods (liquidation of entries) within one year from the date of entry of the merchandise.[1] The statute provides that, if the liquidation is not completed during that one-year period, the merchandise "shall be deemed liquidated at the rate of duty * * * asserted at the time of entry by the importer of record." 19 U.S.C. 1504(a).

The Customs Service may, however, extend the liquidation period if, among other reasons, "the information needed for the proper appraisement or classification of the merchandise, or for insuring compliance with applicable law, is not available to the Customs Service." 19 U.S.C. 1504(b)(1); see also 19 C.F.R. 159.12(a)(1).[2] If a District Director of the Customs Service wishes to extend the liquidation period for merchandise, "he promptly shall notify [the importer of record and its surety] on Customs Form 4333-A,

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[1] "*Liquidation* means the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. 159.1.

[2] The version of Section 1504(b) in effect at the time of entry provided, in pertinent part:

> The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if—
>
> (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer.

19 U.S.C. 1504(b) (1988). The statute was amended to its current form by Pub. L. No. 103-182, § 641, 107 Stat. 2204 (1993).

appropriately modified, that the time has been extended and the reasons for doing so." 19 C.F.R. 159.12(b).[3]

An importer, surety, or other authorized person who wishes to dispute the liquidated amount of duties may file an administrative protest. 19 U.S.C. 1514. If, after the protest, the party is still dissatisfied, it may seek judicial review of the duty in the Court of International Trade. 28 U.S.C. 1581(a).

2. Petitioner is the surety that posted bonds for M. Genauer, the importer of record, in connection with the eight entries of merchandise covered by this action. All the entries occurred in 1989. In July 1990, both Genauer and petitioner received notices from the Customs Service indicating that the time to liquidate the entries was being extended for one year. Each of the notices stated:

> THIS IS A COURTESY NOTICE. THE LIQUIDATION OF THIS ENTRY HAS BEEN EXTENDED; ADDITIONAL TIME IS REQUIRED BY CUSTOMS TO PROCESS THIS TRANSACTION. NO ACTION IS NECESSARY ON YOUR PART UNLESS INFORMATION IS SPECIFICALLY REQUESTED BY CUSTOMS.

Pet. App. A4. In July 1991, the Customs Service liquidated the entries at a higher duty than that claimed by Genauer upon entry. Petitioner paid the liquidated duties under protest. *Ibid.*

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[3] The period for liquidation may be extended in one-year intervals, for a period not to exceed a total of four years. 19 C.F.R. 159.12(a), (c) and (d).

3. Petitioner filed this action in the Court of International Trade to recover the duties assessed and paid after the Customs Service extended the liquidation period. Petitioner contended that Customs' extensions were invalid because the notices sent to it and Genauer failed to recite the specific statutory reason invoked for extending the liquidation period. Petitioner therefore contended that, under Section 1504(a), the entries should be deemed liquidated at the rate of duty asserted at the time of entry.

The Court of International Trade agreed and granted summary judgment to petitioner. Pet. App. A20-A28. The court relied on the decision of the Court of Appeals for the Federal Circuit in *St. Paul Fire & Marine Insurance Co.* v. *United States*, 6 F.3d 763 (1993), which it read to hold that the liquidation period may be extended only if "Customs notifies the importer of the extension and articulates one of the three statutory reasons for the extension." Pet. App. A25; see 6 F.3d at 767. The court concluded that, because in this case the Customs Service had not specifically notified petitioner that "information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer" (see 19 U.S.C. 1504(b)(1988)), the extension was invalid. Pet. App. A26.

4. A divided panel of the Court of Appeals for the Federal Circuit reversed. Pet. App. A1-A16. The court of appeals initially agreed with the trial court that, because the notices provided by Customs did not recite the statutory reason for extending the liquidation period, those notices did not satisfy the requirement of the relevant Customs Service regulation, 19 C.F.R. 159.12(b), as construed by the *St. Paul* decision. See Pet. App. A6.

The court of appeals also held, however, that the Customs Service's omission was harmless error. Pet. App. A7. The court noted that neither the statute nor the relevant Customs Service regulation dictated that the necessary consequence of a technical defect in the extension notice is to render the extension void. *Id.* at A8. The court observed that, in analogous areas of the law, such as that governing notices of appeal from the district courts to the courts of appeals, "imperfect but substantial compliance" with technical requirements is sufficient. *Id.* at A9. The court of appeals also noted that this Court has held that an agency's failure to satisfy a statutory timing requirement does not deprive the agency of its authority to act, *id.* at A10-A11, since the national interest in the administration of the laws should not "fall victim" to technical errors by administrative agencies, *id.* at A11-A12. The court further concluded that petitioner was not prejudiced by Customs' omission, because petitioner "was not deprived of its opportunity to challenge the extensions in court on the ground that they were not obtained for a statutorily valid reason." *Id.* at A13.

Finally, although petitioner had abandoned a count in its complaint alleging that the extensions were void because there was no proper basis for the extensions (see Pet. 7-8), the court of appeals remanded the case to the Court of International Trade to determine whether petitioner had "waived its right to contest whether the extensions were in fact obtained for a valid reason." Pet. App. A14.[4]

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[4] Judge Rader dissented. Pet. App. A15-A16. He agreed with the majority that the Customs Service's notices were

ARGUMENT

The court of appeals' decision that the technical defect in the Customs Service's notices extending the liquidation period was harmless error is correct. That decision does not conflict with any decision of this Court or any other court of appeals. Moreover, petitioner's argument is based in large part on language in the relevant statute that has since been amended. Accordingly, further review is not warranted.

1. Under 19 U.S.C. 1504(a), an entry that is not liquidated within one year of the date of entry will be deemed liquidated at the rate of duty asserted by the importer at the time of entry, unless the liquidation period is extended as provided in 19 U.S.C. 1504(b). The version of Section 1504(b) applicable to this case[5] provided that Customs could extend the liquidation of entries if one of the specified reasons for extension existed, and the importer of record was notified of the extension. Section 1504(b) does not now and did not then, however, prescribe the form or manner of the notice to be provided to the importer. Nor does the statute itself require that the importer be provided with the specific reason for the extension; that requirement is supplied, rather, by the Customs Service's own regulation, 19 C.F.R. 159.12(b). Further, neither the statute nor the regulation states that the failure of the Customs Service to articulate the specific reason for the extension of the liquidation period renders that extension void.

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invalid, but concluded that petitioner was prejudiced by the omission from the notices. *Id.* at A16.

[5] See note 2, *supra*; see also pp. 10-11, *infra*.

Thus, contrary to petitioner's argument (Pet. 13-15), this is not an area in which Congress has spoken to the precise issue at hand, namely, the consequence of the agency's failure to adhere to a technical aspect of a notice regulation.[6] Accordingly, the court of appeals correctly concluded that general principles of harmless error in judicial review of administrative action should be applied to this case. And, as the court of appeals noted, the courts should be hesitant to conclude that an agency's failure to meet a technical requirement of notice renders subsequent agency action void, especially when important public rights are at stake, and no private party would suffer prejudice by validation of the agency action. See Pet. App. A8-A11; *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) (Secretary of Labor did not lose jurisdiction to seek reimbursement of misused CETA funds by failing to issue final determination within statutory time limit of 120 days).

Petitioner maintains that Congress intended to increase certainty in the process of assessing duties, and that it was prejudiced by the agency's omission because the agency subsequently decided to impose a higher duty than the one claimed at the time of entry. Petitioner notes that Congress was concerned that

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[6] For that reason, petitioner's reliance on Section 1504 as a jurisdictional bar or a statute of limitations (Pet. 22-27) is unavailing. Petitioner contends that Section 1504(a) provides that the consequence of the Customs Service's failure to extend the liquidation period is to liquidate the entries at the rate of duty claimed by the importer. Even if that point is correct, however, it does not resolve this case. The issue in this case is the consequence of the Customs Service's failure to specify the reason for the extension of the liquidation period, not the consequence of its failure to extend that period at all.

an importer or its surety might learn, years after the goods had been imported, that they were subject to a higher duty than the one they had expected. Pet. 17.

As the court of appeals pointed out, however, petitioner was made aware in a timely fashion that the liquidation period was being extended, even though the extension notice might not have complied with all technical requirements. "The purpose of the notice—to increase certainty in the customs process by apprising the importer and its surety of the precise period within which final action would be taken on the liquidation—was therefore satisfied." Pet. App. A12. Petitioner was made aware, as required by the statute, that Customs was evaluating its claim about the applicable duty. Thus, petitioner knew that it would not have the benefit, by default, of the provision of Section 1504(a) that sets the duty as that claimed by the importer when Customs does not liquidate an entry within one year and also fails to extend the liquidation period.

Furthermore, if petitioner believed that Customs did not have a valid statutory reason for extending the liquidation period, it could have presented that argument to the courts upon judicial review of the duties that were eventually assessed. Thus, petitioner has not shown that its substantive rights were infringed by the agency's technical error. Cf. *Braniff Airways, Inc.* v. *Civil Aeronautics Bd.*, 379 F.2d 453, 465-466 (D.C. Cir. 1967).[7]

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[7] See *Sagebrush Rebellion, Inc.* v. *Hodel*, 790 F.2d 760 (9th Cir. 1986) (notices of draft environmental impact statements and hearings were valid although they failed to state that the Secretary of the Interior, rather than Congress, might create the subject conservation area); *United States* v. *Priority Prods., Inc.*, 793 F.2d 296 (Fed. Cir. 1986) (administrative pre-

2. Petitioner argues that the decision below conflicts with decisions of other circuits holding that an agency's action in violation of its own regulations is void. Pet. 20-22. With one exception, however, those decisions do not concern the issue presented here, namely, the consequences of an agency's failure to comply with its own technical requirement bearing on the timing of agency action. The one case relied on by petitioner that does address that issue, *Lehigh Valley Manpower Program* v. *Donovan*, 718 F.2d 99 (3d Cir. 1983) (see Pet. 21-22), was subsequently disapproved by this Court in *Brock* v. *Pierce County*, *supra*. See 476 U.S. at 258 n.5.

In *Pierce County*, the Court noted that, although the relevant regulations arguably created a statutory timetable for issuance of a final determination on complaints about misuse of federal funds, they did not "specify any consequences of a failure to meet that deadline[.] * * * Thus, even if it were possible for the Secretary to create a jurisdictional limitation not contained in the statute, the language of the regulations cannot support [the] contention that the 120-day provision is jurisdictional." 476 U.S. at 265. The same analysis applies here. Nothing in the agency's regulation requiring articulation of the specific reason for extension of the liquidation period also specifies that the consequence of a failure to articu-

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penalty and penalty notices naming only corporation did not preclude action to recover penalties against husband and wife who were the sole corporate shareholders); see also *Small Refiner Lead Phase-down Task Force* v. *United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("Our cases recognize that even if the agency has not given notice in the statutorily prescribed fashion, actual notice will render the error harmless.").

late that reason is to render the extension void. Accordingly, *Pierce County* fully supports the court of appeals' conclusion that the Customs Service's failure to meet all the requirements of its own regulation did not deprive it of authority to extend the liquidation period.

3. Finally, we note that petitioner's argument is based in large part on language in the statute that has been amended. As petitioner points out, the version of Section 1504(b) in effect at the time of entry provided that "[t]he Secretary may extend the period in which to liquidate an entry *by giving notice* of such extension to the importer of record." See Pet. 3 (quoting 19 U.S.C. 1504(b) (1988)) (emphasis added). Petitioner argues (Pet. 15) that the Customs Service's notice to the importer is the act of extension itself, and that a failure to give proper notice is also a failure to extend the liquidation period.

The statute, however, no longer states that the liquidation period may be extended "by giving notice." It now provides that "[t]he Secretary may extend the period in which to liquidate an entry" if relevant information is not available, and provides separately that "[t]he Secretary shall give notice of an extension under this subsection to the importer of record and the surety." 19 U.S.C. 1504(b). Accordingly, even if petitioner's contention had merit, it would have no continuing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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